IN THE

# Supreme Court of the United States

**October Term, 1978**

**No. 78-1208**

CURTIS CIRCULATION COMPANY,

*Petitioner,*

*against*

GOULD PAPER CORPORATION,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Gould Paper Corporation, respectfully requests that this Court deny the petition for a writ of certiorari to review the unanimous *per curiam* decision of the United States Court of Appeals for the Second Circuit entered on December 13, 1978.

### Questions Presented

1. Whether the District Court and the Court of Appeals erred in applying the clear mandate of Section 9-318 of the Uniform Commercial Code to bar an account debtor under an assignment from raising against the assignee personal claims of the assignor unrelated either to the creation of the debt between the assignor and the assignee or to the account between the debtor and the assignor?

2. Whether the District Court abused its discretion when, following its decision on the sole issue submitted for trial under the Pre-Trial Order, it received additional

evidence relating to an alleged limitation on damages which was first articulated by the defendant after trial?

## Statutes Involved

This case involves the following statute in addition to the one quoted in the petition:

N.Y. U.C.C. §9-204, which provides in part:

> "(1) A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching."

## Statement of the Case

The petition in this case raises no issue worthy of review by this Court. The first question presented involves purely state commercial law, on which the decisions of the courts below are well supported by New York statutory and common law. The second question seeks further review by this Court of a simple exercise of discretion by the District Court, unanimously affirmed by the Court of Appeals, which found the contention so lacking in merit as to "warrant only brief mention" in its *per curiam* opinion (3a).*

This commercial litigation arises from the wrongful refusal of petitioner to honor a written assignment. Gould Paper Corporation ("Gould"), the assignee, is a paper merchant. It purchases paper from mills and sells it directly to customers such as magazine publishers. Curtis Circulation Company ("Curtis"), the obligor under the assignment, is a nationwide distributor of magazines including *Penthouse* magazine, published by the assignor, Penthouse International Limited ("Penthouse"). The

* Citations of numbers followed by "a" are to pages of the appendix attached to the petition.



assignment ("Assignment") was negotiated by Gould in 1969 to protect it against the non-payment by Penthouse of its paper bills, by allowing Gould to look to Curtis. When Penthouse refused to pay Gould for more than $750,000 worth of paper shipped in January and February 1976, Gould sought to exercise its bargained-for security. However, Curtis, indemnified by Penthouse and represented by Penthouse's attorneys, refused to honor the Assignment, thus precipitating the instant litigation.*

In January 1977, the case was called for trial. The sole issue raised at trial—indeed the only defense specified in the Pre-Trial Order and in Curtis' post-trial brief—was Curtis' claim that the Assignment had been cancelled by Gould sometime after 1972. By decision dated November 2, 1977, the trial court rejected the testimony of the Curtis and Penthouse witnesses, found for Gould and awarded it $717,786.33—the amount stipulated by the parties as the value of the paper shipped to Penthouse in 1976 (Appendix C). Eight days later, Curtis wrote to Judge Stewart, demanding that the judgment be reduced to $88,720.80. For the first time in the litigation, Curtis argued that Gould's damages under the Assignment were limited by certain language in the Assignment—subsequently found by both the trial court and the Second Circuit to be unclear or ambiguous (2a, 3a). In light of Curtis' belated argument as to damages, Judge Stewart exercised his discretion to reopen the record for receipt of additional evidence on this defense.

The reopened trial began on March 20, 1978. After hearing all of the evidence, by its opinion of June 15, 1978

* Penthouse's only excuse for non-payment has been its still unproven claim that Gould "overcharged" Penthouse on *prior* unrelated shipments of paper going back to 1974. This "overcharge" claim was asserted against Gould by Penthouse in a New York state court action over three years ago but has yet to be tried. Gould has asserted counterclaims against Penthouse arising out of contractual disputes between them, for an amount in excess of these alleged overcharges.

(22a-30a), the District Court rejected Curtis' new defense that the language "initial and first payments" was meant to limit the Assignment and entered judgment for Gould on June 21, 1978.

In a unanimous *per curiam* decision entered only hours after oral argument on December 13, 1978, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court substantially on the opinions below (Appendix A). The Court of Appeals held to be "without merit" petitioner's claim that Curtis should have been permitted to assert Penthouse's overcharges against Gould. The Court ruled that the clear language of New York's Uniform Commercial Code (§9-318) specifically sets forth the defenses available to an account debtor and does not include those of the assignor against the assignee. The decision to reopen the record to receive evidence on Curtis' belated defense was held to be one "committed to the discretion of the trial judge" and the Second Circuit found that Curtis had "failed to show any reason for disturbing the exercise of that discretion here," particularly since Curtis had failed to raise the damage issue during trial (3a).

## Reasons for Denying the Writ

### I

### The courts below properly construed New York law.

The first issue raised by petitioner simply challenges the District Court's and the Court of Appeals' application of New York State commercial law. Curtis contends that, as account debtor, it should have been permitted to defeat the Assignment by asserting Penthouse's personal claims against Gould for alleged "overcharges" on earlier shipments of paper unrelated to the 1976 paper bills upon which Gould sued. There has never been any question that this



issue is governed solely by New York law, including the Uniform Commercial Code, which both courts below applied without great difficulty to bar Curtis from asserting the personal claims of Penthouse.

Rarely, if ever, does this Court grant review of such federal court determinations of state law, save in "exceptional cases." See, *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944); R. Stern & E. Gressman, *Supreme Court Practice*, 283 (5th ed. 1978). Here, far from showing anything exceptional, petitioner argues that the Second Circuit's *per curiam* decision *may* have some precedential value simply because it applies the Uniform Comemrcial Code, which is law in 51 jurisdictions. But petitioner shows absolutely no conflict among the states or the Circuit Courts of Appeals over the U.C.C. provisions involved in this case. Nor does it show that the decisions below are inconsistent with any decisions of this Court or with any state court interpretation of the relevant U.C.C. provisions. Rather, its argument is that this Court should review routine applications of state commercial law by the federal appellate courts merely because they are based on the U.C.C. —a proposition which, if accepted, would vastly expand this Court's already crowded docket.

There is absolutely nothing "exceptional" about the state law issue in this case. Although petitioner claims that the decisions below conflict with New York common law, it cites no authority holding that an account debtor may assert against the assignee the personal claims of the assignor. Rather, the decisions below are completely in accord not only with the specific language of New York's Uniform Commercial Code, but also with pre-existing common law. For this reason, petitioner's first contention is, as the Court of Appeals held, "without merit."

New York U.C.C. §9-318, sets forth the catalog of defenses available to an account debtor in a suit by an assignee:

> "(a) all terms of the contract between the account debtor and the assignor and any defense or claim arising therefrom; and
>
> "(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment."

Precisely the same defenses, and no others, were available to the account debtor under common law prior to adoption of the U.C.C. 4 A. Corbin, *Contracts*, §896, at 595 (1961); *Restatement of Contracts*, §161 (1932). As the Second Circuit held (3a), the defense which petitioner was barred from asserting against Gould—namely Penthouse's claim of overcharges on unrelated sales of paper—is not among the defenses available to the account debtor. Only those defenses which the account debtor (Curtis) had against the assignor (Penthouse) or which the account debtor has *independently* against the assignee (Gould) can be asserted to defeat the enforcement of the Assignment.

In the face of the clear statutory framework of Section 9-318, and contrary to the "expressio unius" maxim, petitioner argues that since the defense it seeks to assert is not among those listed in U.C.C. §9-318, common law and not the U.C.C. must apply. But even if that strained reading of U.C.C. §9-318 had any merit, it would not help petitioner since, as noted, the defenses available to an account debtor under common law were exactly the same as those specified by the code.

As the Second Circuit held, the only authority cited by petitioner in seeking to show that common law was inconsistent with U.C.C. §9-318, *Warren* v. *Chemical Bank and Trust Co.*, 274 A.D. 785, 79 N.Y.S.2d 776 (1st Dep't 1948), is simply "not on point" (3a). In *Warren*, the condition precedent to creation of an obligation never occurred and thus no debt ever arose to which the security interest could attach.* *Warren* would be analogous if, but only if, Gould had not shipped paper to Penthouse in 1976, or if that paper had been defective. But here, it was stipulated in the Pre-Trial Order that paper was shipped and received in good condition. When the paper was received, the Assignment attached. Nothing in *Warren* suggests otherwise.



Petitioner seeks to avoid the force of U.C.C. §9-318 and the consistent common-law doctrine by arguing that they apply only to *absolute* assignments, not security devices, such as this Assignment was. But Article 9 of the Uniform Commercial Code (including both Sections 9-204 and 9-318) is by definition applicable to *secured* transactions, and both Corbin and the Restatement make absolutely no distinction between absolute and conditional assignments in discussing the defenses available to the account debter. Indeed, as Professor Gilmore noted in his treatise, *Security Interests in Personal Property*, §41.2 at 1082 (1965):

> "Defenses which may be asserted against an assignee whose right was originally subject to a condition are, apart from the condition itself, exactly the same as those which may be asserted against the assignee whose right was not conditional."

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* New York U.C.C. §9-204 states three conditions precedent to the creation of an enforceable security interest: (1) there must be an agreement that it attach; (2) value must be given; and (3) the debtor must have rights in the collateral. As the courts below held, all three conditions were met here—there was an agreement, the Assignment; value in the amount of $717,786.33 was given when the paper was shipped in January and February 1976; and Penthouse obtained rights in the proceeds of its Distribution Agreement with Curtis for the March, April and May issues of the magazine.

As noted in P. Cogan, W. Hogan & D. Vagts, *Secured Transactions Under the Uniform Commercial Code* (Bender's U.C.C. Commentary, Vol. 1A), §21.02, page 2175 (1978), once the assignment attached, the right to payment was unconditional, subject *only* to adjustments of the type allowed under U.C.C. §9-318(1).

In *Warren*, by contrast, the security interest never attached because no value was ever given.

Here, the only condition was the shipment of paper and it was stipulated that this condition was met. Accordingly, the Assignment was enforceable against Curtis, subject only to the defenses enumerated in U.C.C. §9-318, precisely as the Court of Appeals held.

## II

**The decision below properly affirmed the trial court's exercise of discretion.**

As the Court of Appeals held, the second question presented in the petition warrants only brief mention (3a). The petition itself acknowledges (p. 8) that Judge Stewart's decision to reopen the record was an "exercise of discretion" and petitioner offers nothing which would justify review of that exercise by this Court.

This Court recognized in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971) that "a motion to reopen to submit additional proof is addressed to [the trial judge's] sound discretion." The petition cites not a single case in which this Court, or even a federal Court of Appeals, reversed a trial judge's decision to reopen a record. As Professor Moore has stated, review of such a decision is extremely narrow and is subject to reversal "only in a rare case where abuse is clearly shown." 6A J. Moore, *Federal Practice*, §59.04 [13] (1974).

Upon reviewing the record in this case, the Court of Appeals not only failed to find an abuse of discretion, but held that:

> "[I]n view of Curtis's failure to raise the damages issue earlier . . . Judge Stewart's ruling was correct." (3a)

That the decision of the District Court was a proper exercise of discretion is clear from the facts. In January 1977, when the case was called for trial, the sole issue litigated was Curtis' defense that Gould had released the Assignment in 1973. This was the only defense specified in the Pre-Trial Order or advanced by Curtis in its post-trial brief. Not until after the trial ended and a final decision was rendered on what Curtis' own post-trial brief called "the sole issue before the Court" did Curtis raise the contention that Gould's damages, which had theretofore not been questioned, should be limited under its view of the scope of the Assignment.



Despite his understanding that the "sole issue" before the Court at trial was the release of the Assignment (22a), Judge Stewart nonetheless agreed to reopen the record, not to enable Gould to cure any "deficiency" in the evidence as to the amount of its damages—which had already been set forth in the Pre-Trial Order and at trial—but so that *Curtis* could introduce evidence on *its* belated contention that the Assignment was limited in scope. It is this decision *in its favor* that petitioner now challenges. Reopening of the trial under such circumstances cannot possibly have prejudiced Curtis, since once the trial was reopened, Curtis was given every opportunity to present evidence in support of its contention.

Petitioner rejects Judge Stewart's statement that both he and Gould believed the alleged release of the Assignment to be the sole issue at trial, based only upon a single brief colloquy on the opening day of a four-day trial in January 1977 (Petition, pp. 8-9). That colloquy shows only that Gould's counsel did *not* understand there to be any other issue before the Court. As Gould's counsel stated, he was "not sure what point Mr. Grutman intends to draw from that" and did not "know whether it was going to have any relevance." The colloquy only points up what the Court of Appeals found—that Curtis "fail[ed]

to raise the damages issue'' until November 1977, after it had lost on the only issue which was submitted for trial.

This Court need go no further than the cases cited by petitioner to recognize the full range of discretion afforded a trial judge in determining whether to reopen a record. As noted, not one represents a reversal by an appellate court of a trial judge's exercise of discretion. Indeed, in *Pacific Indemnity Co.* v. *Broward County,* 465 F.2d 99 (5th Cir. 1972) cited by petitioner (Petition, p. 10), the Court specifically held that once the need for additional proof on an issue not in the Pre-Trial Order became clear, the trial court ''could have ordered a limited new trial under Rule 59 F. R. Civ. P. where . . . the issue was in good faith overlooked by all concerned'' (465 F.2d at 104). That is precisely what the District Court did here and there is no reason for this Court to review that exercise of discretion after its unanimous affirmance by the Second Circuit.

## Conclusion

**For these reasons, the petition for a writ of certiorari should be denied.**

Dated: February 7, 1979

Respectfully submitted,

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